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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

TELENA D. WOOLSEY,

Petitioner,

vs.

JAMES C. HUNT, M.D., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court erroneously interpreted Supreme Court precedent in finding that Petitioner had no property interest in continued employment under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

LIST OF PARTIES

In addition to the parties named in the caption, other parties to the proceedings below were Arnold E. Postlethwaite, M.D., who was sued both individually and in his official capacity, and The University of Tennessee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Telena D. Woolsey, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 9, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Docket No. 90-5083) for which this petition for a writ of certiorari is sought is reproduced as Appendix 1 (hereafter "App. 1") to this petition. The Findings of Fact and Conclusions of Law entered by the

district court are reproduced herein as Appendix 2 (hereafter "App. 2").

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1991 (App. 1). This petition is filed within ninety (90) days of entry of that judgment, invoking the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the due process clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The constitutional question presented in this petition arises from a civil complaint by Petitioner, Telena Woolsey, pursuant to 42 U.S.C. § 1983, claiming that she was

discharged from her employment at the University of Tennessee Center for the Health Sciences without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Upon hearing all the evidence at trial, the district court entered Findings of Fact and Conclusions of Law (App. 2), wherein the district judge found that the words, actions and policies of Respondents combined to create an implied promise of continued employment and to give Petitioner a legitimate claim of entitlement to such employment. (App. 2 at pp. 54-55). The district court concluded that Petitioner thus had a property interest in continued employment, within the meaning of the Fourteenth Amendment, and that Respondents could not deprive her of that interest without due process of law.

The district court went on to find that Petitioner had not been provided due process in that it was undisputed she had not received any form of hearing either prior to or subsequent to her termination. Based upon these findings and conclusions, the district court entered a judgment for Petitioner in which she was awarded reinstatement, backpay, and lost benefits, as well as compensatory damages and attorney's fees.

Respondent appealed to the United States Court of Appeals for the Sixth Circuit, which received briefs and oral argument from the parties on all issues, including whether Petitioner had a property interest under the Fourteenth Amendment. The Court of Appeals issued its opinion (App. 1) on May 9, 1991. In this opinion, the Court of Appeals acknowledged that the district court's findings of fact were not "clearly erroneous", but went on

to hold that Petitioner did not have a constitutionally protected property interest in continued employment at the University.

This holding by the Court of Appeals was premised on its finding that the State of Tennessee, pursuant to state statutory law, does not recognize enforcement of an implied contract against the state. On this basis, the Court of Appeals reversed the judgment of the district court and vacated the order granting Petitioner reinstatement, restitution, attorney's fees and costs.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The decision of the Sixth Circuit construes the decisions of this Court in a manner that effectively permits the State of Tennessee to render the due process clause of the Fourteenth Amendment meaningless in the public employment context.

The threshold issue to be determined in any discharged employee's claim under the Fourteenth Amendment's due process clause is whether the employee has a constitutionally protected property interest in continued employment. As stated by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), such interests

> are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id., at 577. This language has been expanded upon by the Court to make it clear that the "independent source" referred to in *Roth* may be a statute, policy, practice, regulation or guideline. *Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). It is not disputed, and the Sixth Circuit decision acknowledged, that if these rules or understandings amount to an "implied promise" of continued employment, then a property interest is established.

In the instant case, the trial court found that,

> The words, actions and policies of defendants combined to create an implied promise of continued employment and to give Woolsey a legitimate claim of entitlement to such employment. (App. 2 at pp. 54-55)

The trial court further found that,

> . . . events occurred that elevated the parties' rather indefinite expectations to the level of an "implied" contract or "mutually explicit understanding" that creates a property interest in continued employment . . . The parties thus mutually agreed – implicitly and explicitly – that plaintiff would be given a six month period of employment . . . (App. 2 at p. 57).

The Sixth Circuit, while acknowledging that these findings of fact were supported by the evidence, reversed the trial court's conclusion that these facts gave rise to a property interest cognizable under the Fourteenth Amendment. The basis for the Sixth Circuit's reversal was its determination that the State of Tennessee, by statute, did not recognize enforcement of implied contracts against the state. Petitioner does not dispute that

the law of Tennessee in 1984 precluded a suit against the state for breach of an implied contract. As stated by the court,

> "Further examination of Tennessee law . . . reveals that Tennessee had waived its sovereign immunity only with respect to suits against the state based on an express contract or breach thereof." (App. 1 at p. 26).

The Sixth Circuit then concluded that since Petitioner's interest in continued employment was not enforceable in the state courts, there could be no property interest within the meaning of the Fourteenth Amendment.

Petitioner submits that this assertion of the state's sovereign immunity should not act as a bar to claims by state employees under Section 1 of the Fourteenth Amendment. The relationship between the Fourteenth Amendment and sovereign immunity under the Eleventh Amendment has been addressed previously by this Court in relation to Congressional enactment of the 1972 amendments to Title VII of the 1964 Civil Rights Act pursuant to Section 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Justice Rehnquist noted that,

> The substantive provisions [of the Fourteenth Amendment] are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. *Id.*, at 453.

Justice Rehnquist went on to state,

> [W]e think that the Eleventh Amendment, and the principles of state sovereignty which it

> embodies [citation omitted], are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. *Id.*, at 456.

While it is true that *Fitzpatrick* is distinguishable as it dealt with Congressional enforcement under Section 5, Petitioner asserts that the state's sovereign immunity should be equally limited with regards to Section 1. The effect of the Sixth Circuit's decision in this case is to subordinate the substantive guarantees of due process and equal protection embodied in Section 1 to the various laws of the states.

Petitioner respectfully submits that this result is contrary to the express terms of the Fourteenth Amendment and established precedent. In simple terms, the Sixth Circuit's decision invokes a caveat to the Fourteenth Amendment's due process guarantee – a caveat that this constitutional guarantee can be revoked at any time by the states through legislative enactment.

The inconsistency resulting from the Sixth Circuit's decision is made more glaring when it is considered that under *Hudson v. Palmer*, 468 U.S. 517 (1984), a state employee's claim for violation of procedural due process can be dismissed if it is established that the employee has an adequate remedy available under state law. *Id.*, at 532. Thus, under the Sixth Circuit's decision in this case, Petitioner and other similarly situated employees are deprived of any opportunity to assert a due process claim – *regardless of the factual circumstances of their employment*. Petitioner has no remedy under state law, and the Sixth Circuit's decision uses that very fact as a basis for concluding there is no property interest, thereby depriving

her of any right to due process under the Fourteenth Amendment.

CONCLUSION

Petitioner asserts that the Sixth Circuit's decision that she did not possess a constitutionally protected property interest in continued employment is an erroneous application of existing decisions by this Court. To the extent this Court's language in *Bishop v. Wood, supra,* and other related decisions has been interpreted to support the Sixth circuit's decision, Petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX 1

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-5083

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TELENA D. WOOLSEY, *Plaintiff-Appellee,* *v.* JAMES C. HUNT, Chancellor of University of Tennessee Center for Health Sciences; ARNOLD E. POSTLETHWAITE, Director of the Connective Tissue Diseases Division of the Department of Medicine; and the UNIVERSITY OF TENNESSEE, *Defendants-Appellants.*	ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed May 9, 1991

Before: KEITH, KENNEDY and SUHRHEINRICH, Circuit Judges.

KEITH, Circuit Judge. James C. Hunt, M.D. ("Hunt"), Chancellor of the University of Tennessee Center for Health Sciences ("UTCHS"), Arnold E. Postlethwaite,

M.D. ("Dr. Postelthwaite"), Director of the Connective Tissue Diseases Division ("CTDD") of the Department of Medicine, and the University of Tennessee ("University"), defendants-appellants (collectively "defendants"), appeal from the district court's June 21, 1989, judgment and damages award entered pursuant to 42 U.S.C. § 1983 in favor of plaintiff-appellee, Telena D. Woolsey ("plaintiff"). For the reasons set forth below, we **REVERSE**.

I.

STATEMENT OF THE CASE

A.

STATEMENT OF THE FACTS

Plaintiff was first employed at UTCHS on February 9, 1977, as a senior secretary in CTDD. Prior to her employment plaintiff had been an executive secretary for a number of years. On September 1, 1981, plaintiff's position was reclassified and upgraded, resulting in a promotion to the position of office supervisor in the division. Among her duties were secretarial duties for the chief of the section, administrative duties, as well as training and supervision of office personnel.

Plaintiff's 1983-1984 evaluation by the then CTDD Director, Dr. Robert S. Pinals ("Dr. Pinals") was outstanding. In the evaluation, Dr. Pinals described plaintiff as "an excellent employee, very efficient, devoted to her job. . . . "In the spring of 1984, Dr. Pinals decided to accept a position as chairman of the Department of Medicine at Princeton University. Dr. Postlethwaite was designated to assume the position of CTDD Director

previously occupied by Dr. Pinals. Shortly after Dr. Postlethwaite had been named Dr. Pinals' successor, on March 28, 1984, Dr. Postlethwaite informed Dr. Pinals that he wanted plaintiff to leave when Dr. Postlethwaite assumed the directorship. Dr. Pinals advised Dr. Postlethwaite that there must be cause for such an action and that no cause existed. Dr. Postlethwaite responded that he would document cause.[1] Dr. Pinals made a written record of this conversation and signed it on April 2, 1984.

After his conversation with Dr. Pinals, Dr. Postlethwaite consulted Scott McDaniel ("McDaniel"), business manager for the Department of Medicine, about reorganizing CTDD. McDaniel referred the matter to Paula Harris ("Harris"), then Director of personnel services. Harris approved Dr. Postlethwaite's proposed reorganization, which included the elimination of plaintiff's position of office supervisor.

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[1] The district court made no finding about why Dr. Postlethwaite wanted plaintiff to leave the department. The district court did, however, find that Dr. Postlethwaite's actions were motivated more by a desire to get rid of plaintiff than a desire to rid himself of a poor organizational structure. In this vein, the district court stated:

> There is some evidence to suggest that Postlethwaite resented Pinals and wanted to get rid of plaintiff because she had been Pinals' trusted assistant. There is also evidence suggesting that Postlethwaite simply felt that the office supervisor's position created confusion and frustration on the part of senior secretaries in the department and this organizational structure resulted in the secretaries receiving orders form too many people.
>
> Joint Appendix at 30 (Findings of Fact and Conclusions of Law).

During this time, Dr. Pinals informed plaintiff about his conversation with Dr. Postlethwaite. Before Dr. Postlethwaite assumed his duties as CTDD director, plaintiff learned about Dr. Postlethwaite's plans for reorganization. Plaintiff promptly sought the advice of Roland Woodson ("Woodson"), UTCHS Director of employee relations. On or by April 2, 1984, Woodson assured plaintiff that Dr. Postlethwaite could not "get rid" of her through reorganization. Woodson conveyed to plaintiff that he considered what was being done to her immoral and unjust. Woodson also expressed his opinion regarding Dr. Postlethwaite's treatment of plaintiff to Woodson's superiors, Howard Carman ("Carman"), Vice Chancellor for Facilities Management and Human Resources, and Dr. T. Earle Bowen ("Bowen"), Vice Chancellor for Administration. Bowen informed plaintiff also that Dr. Postlethwaite's action in seeking to terminate plaintiff through departmental reorganization was illegal and could not be done.

On June 29, 1984, plaintiff received a reappointment letter from Bowen. In the letter, Bowen advised plaintiff that her salary, effective July 1, 1984, would be at a monthly rate of $1,254, and an annual rate of $15,048. The letter stated that the terms and conditions of her employment with the University were in accordance with the policies and procedures set forth in the Personnel Policies and Procedures Manual. The employment status policy referred to at that time stated that regular staff non-exempt employees were employed "for a term that is expected to be six months or more." Joint Appendix at 32 (Findings of Fact and Conclusions of Law). A new employment status policy took effect on July 1, 1984,

which stated that all non-faculty employees "are not employed for a specified time, but, instead, serve on an 'at will' basis, subject to the policies and procedures set forth in the Personnel Policies and Procedures Manual." *Id.* at 242. The revised policy also contained the language included in the old policy stating that employees in plaintiff's category were employed for a term expected to be six months or more. The district court found that there was no evidence that any of the parties involved were aware of the revision at any time pertinent to this lawsuit.

Despite the assurances to plaintiff from University officials that Dr. Postlethwaite's reorganization plan was not a legitimate action, plaintiff received notification of the elimination of her position from Dr. Postlethwaite in a memorandum dated July 1, 1984, the date he assumed the duties of CTDD director. The memorandum stated that, effective July 31, 1984, her position would be eliminated because of departmental reorganization; the memorandum also advised plaintiff to apply for employment elsewhere within the University.

On July 17, 1984, plaintiff initiated a grievance pursuant to the University's employee grievance policy concerning the elimination of her position as senior secretary and office supervisor. Her grievance addressed two additional matters pertaining to the elimination of her position. She complained that junior secretaries were being retained, while her position as a senior secretary and office supervisor, was being eliminated. She also complained that the elimination of her position was as a result of Dr. Postlethwaite's "personal whim" to "get rid" of her "without due cause." Plaintiff requested reversal of

the plan to eliminate her position and the cessation of further threats to terminate her position within CTDD.

Subsequently, plaintiff's 1983-1984 outstanding evaluation by Dr. Pinals was reduced to satisfactory. McDaniel notified plaintiff of the reduction on July 25, 1984. In a July 26, 1984, letter to plaintiff, McDaniel claimed that Dr. Pinals had requested this downgrading in the evaluation. Further, McDaniels claimed that Dr. Pinals had not timely requested approval of plaintiff's outstanding evaluation from the Dean of the College of Medicine. McDaniel characterized the downgrading of plaintiff's performance evaluation as part of a random process to comply with the mandate from the University to limit the number of employee evaluations in each of the four categories. McDaniel testified before the district court that plaintiff's performance evaluation had been reduced several weeks earlier, but that he had inadvertently forgotten to notify her until July 25, 1984. The district court did not credit the latter testimony because McDaniel admitted that all other employees whose evaluations had been downgraded were notified in May. Further, the district court admitted into evidence Dr. Pinals' timely request for an outstanding evaluation for plaintiff on April 25, 1984. Following notification of her performance evaluation downgrade, plaintiff filed a second grievance concerning the evaluation.

On July 23, 1984, plaintiff met with Harris and Carman. Carman offered plaintiff continued employment of one to two months if she would drop the grievance. Plaintiff refused. Carman and Harris then agreed to extend her employment indefinitely to allow her to seek other employment at the University. Harris confirmed

this agreement by letter to plaintiff dated July 24, 1984. The letter stated that the reorganization of CTDD had affected plaintiff's duties and that her new responsibilities would be defined by the administrators of that division.

On July 26, 1984, Dr. Postlethwaite advised plaintiff by letter that her employment in CTDD was being extended beyond July 31, 1984. The letter also directed her to report as a temporary secretary to another part of the division. Plaintiff was instructed to vacate her office by July 30, 1984. While removing her belongings from her office on July 27, 1984, in compliance with Dr. Postlethwaite's order, plaintiff injured her wrists. As a result of this injury, plaintiff was initially put on authorized sick leave. This was subsequently converted to a leave of absence under worker's compensation. Plaintiff was on leave from the University from July 27, 1984, until her termination on October 8, 1984.

Between July 16 and September 28, 1984, plaintiff continued her efforts to process her grievances and obtain a hearing before University officials.[2] Plaintiff encountered several obstacles to the prompt processing of her grievance. The Department chairperson, Dr. Andrew Kang ("Dr. Kang"), did not initially respond to plaintiff's

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[2] Under the University's grievance procedure, the employee must file within five days of the director's adverse action. The departmental chairman then has five days in which to reply to the employee. If the chairman fails to respond, then the employee can present the grievance to the dean. If the employee is not satisfied with the dean's action, then the employee can request a hearing before the employee relations committee.

first grievance. Plaintiff then attempted to submit the grievance to Dean Robert Summit ("Dean Summit"). Dean Summit refused to hear the grievance until Dr. Kang first considered the matter. On August 16, 1984, still having received no response from Dr. Kang, plaintiff wrote to Dr. Kang regarding her grievance. Dr. Kang responded on August 17, 1984, by upholding both Dr. Postlethwaite's removal of plaintiff from her position in CTDD and the downgrading of her performance evaluation. Immediately thereafter, plaintiff appealed to Dean Summitt. Dean Summitt delegated the responsibility for resolving the grievance to Raymond H. Colson, Associate Dean for Administration of the College of Medicine ("Colson").

Colson issued a written memorandum decision regarding plaintiff's first grievance on September 4, 1984. Colson supported Dr. Postlethwaite's decision to eliminate plaintiff's position within CTDD, but recommended that she "be retained as a regular full-time employee within the Rheumatology Division for up to six months at her current rate of pay while she looks for a suitable transfer." Joint Appendix at 208. Colson also upheld the downgrade of plaintiff's performance evaluation. The written decision concluded with the statement that should the findings and conclusions not satisfy the employee, plaintiff was requested to contact the Personnel Office in order to process her grievance to the next level.

During a meeting to discuss Colson's recommendation, plaintiff expressed to him her satisfaction with the six-month extension of employment. She indicated, however, that she was not satisfied with Colson's failure to

address Dr. Postlethwaite's attempt to terminate her without cause. Plaintiff also expressed her dissatisfaction with the resolution of her performance evaluation grievance.

On September 7 and 11, 1984, plaintiff wrote memoranda to Woodson informing him of her desire to appeal Colson's decision and proceed to a hearing before the grievance committee on both the job elimination without cause and the performance evaluation downgrade. Woodson granted plaintiff the grievance hearing by letter on September 14, 1984.

During the interim, while still on medical leave, plaintiff unsuccessfully interviewed for other positions within the University. The Personnel Office directed plaintiff not to discuss her salary on these interviews because her current pay level would be guaranteed and the Personnel Office would inform the interviewers that plaintiff's salary would be supplemented.

On September 19, 1984, Dr. Postlethwaite wrote to plaintiff extending an offer of a senior secretary position in CTDD. The position required ninety-five percent typing. Plaintiff declined the offer in writing, stating that her current disability precluded her from taking a position involving heavy typing. Plaintiff did, however, express interest in another vacant senior secretary position in the division which would allow her to do less typing and gradually regain her typing skills.

On September 25, 1984, Harris contacted plaintiff twice by telephone to arrange a meeting on September 28, 1984, to discuss plaintiff's situation. During the first telephone conversation, Harris advised plaintiff that Dr.

Postlethwaite could not be available for a grievance hearing during the week of October 1, 1984, as plaintiff had requested. Also on September 25, 1984, Dr. Postlethwaite wrote to plaintiff offering her the senior secretary position she had expressed interest in. Dr. Postlethwaite described the job as consisting of sixty percent typing. Plaintiff, however, recalled the position as consisting of only thirty percent typing. In his letter, Dr. Postlethwaite further stated:

> [S]ince your current approved sick leave extends thru [sic] September 30, 1984, I will need to know your written response (accept or reject) to this job offer and to the . . . senior secretary offer of September 19, 1984, on or before 8:00 A.M. October 1, 1984. Send your notification to UTCHS Personnel. If you accept either position, you should report to my office at 8 AM [sic] October 1, 1984 for orientation as to the specifics of the job.

Joint Appendix at 39 (Findings of Fact and Conclusions of Law).

Plaintiff, Carman, Harris and Woodson met on September 28, 1984.[3] During the meeting, plaintiff and Harris

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[3] Plaintiff taped the meeting and a transcript of the entire conversation which took place was admitted into evidence by stipulation of the parties, and provides an accurate account of what occurred. Conflicting testimony was tendered at trial regarding the purpose of this meeting. Harris, Woodson and Carman testified that the purpose of the meeting was to resolve plaintiff's grievances. Harris and Carman further testified that they felt the meeting had come to an end with a clear understanding that plaintiff was required to report to work on October 1, 1984, or provide medical documentation to extend

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arranged to meet with Dr. Postlethwaite on October 1, 1984. On October 1, 1984, plaintiff called Harris and

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her leave status beyond September 30, 1984. The district court found that the transcript indicated that this testimony by defendants' witnesses was inaccurate. The district court found that the following were established during the meeting, crediting plaintiff's testimony and the transcripts:

> Carman confirmed with plaintiff that Postlethwaite had offered her two different jobs. Plaintiff reiterated to those in attendance that she could not do the ninety-five percent typing job and that she questioned whether she could do the sixty percent job at that time. She noted that in her estimation the job in which she had expressed interest had in the past required only thirty percent typing. Plaintiff indicated that she wanted to discuss the sixty percent typing job with Postlethwaite before she made a decision as to whether to accept it. She presented a letter dated September 28, 1984, stating her reservations about the sixty percent job and her desire to discuss it. Contrary to defendants' assertions, plaintiff did not decline the second job offer. In response to this discussion it was agreed that plaintiff Harris, Woodson and Postlethwaite would meet on Monday, October 1, to discuss this second job offer.
>
> Plaintiff's medical disability was also discussed at the meeting. Harris several times mentioned her belief that plaintiff's leave of absence expired September 30, 1984. Plaintiff repeatedly informed Harris that this was not correct, and that she had been advised shortly before the meeting by payroll assistant Eva Gray that she could not return to work until she was released by her doctor. Plaintiff had not been released and indicated that she was still being treated for both stress and her wrist injury. In view

(Continued on following page)

cancelled her appointment scheduled for later that day to discuss the second job offer with Dr. Postlethwaite. Plaintiff explained that she was physically unable to keep the appointment, in part because of stress. She also stated that she would not engage in any future proceedings until the grievance hearing was concluded.

Subsequently, plaintiff had no further contact with University officials until she received two letters, both dated October 8, 1984. The first letter, from Woodson, advised plaintiff that her grievances had been resolved and that he was concluding his responsibility in the matter. The letter indicated that the September 28, 1984, meeting had been held for and had served the purpose of addressing the grievance.[4] The letter further stated that

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of this disagreement between plaintiff and Harris about the expiration date of plaintiff's leave of absence, Carman, who was Harris' superior, several times told plaintiff that he would give her "the benefit of the doubt," thus indicating that plaintiff's leave of absence would not expire on September 30, 1984. Plaintiff was not told that she was required to report to work on Monday [October 1] or justify her absence by medical documentation. Any obligation to report on Monday was mentioned solely in the context of an assumption that plaintiff's leave expired on Monday – an assumption which was in fact erroneous, which plaintiff told Harris, Carman and Woodson was erroneous and about which Carman told plaintiff he would give her the "benefit of the doubt."

Joint Appendix at 40-41 (Findings of Fact and Conclusions of Law).

[4] The district court found that neither of plaintiff's pending grievances had been resolved at the September 28 meeting.

(Continued on following page)

the University's response to her grievance had been to offer two positions at plaintiff's current salary. These positions, Woodson noted, were the original jobs plaintiff had requested, therefore there existed no further need to proceed with the grievance process. The letter also informed plaintiff that her performance evaluation would be changed to excellent, one category below outstanding and one above satisfactory.

The second letter dated October 8 was from Dr. Postlethwaite and stated:

> On September 28, 1984, you advised Personnel that you did not wish to accept this second job offer.
>
> In sum, we have offered you all available vacant clerical positions within the Division. You have declined my offers of continued employment in these positions and have failed to furnish me with satisfactory documentation justifying your continued absence from your job.
>
> Therefore, in accordance with my letter of September 28, I consider your nonacceptance of my offers of continued employment and your unexcused failure to report to work as a voluntary resignation under [University] UT Personnel Policy, 505, Pol. Your University termination will not interrupt any salary replacement awarded by the State Board of Claims as a result

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The evaluation grievance was not discussed at all nor was the job elimination grievance addressed beyond Woodson indicating that the grievance hearing would be held in the future. Joint Appendix at 41 (Findings of Fact and Conclusions of Law).

> of your Worker's Compensation claim if approved. Your final pay will include all accumulated annual leave.
>
> Should you be interested in other employment within the University, you may contact Human Resources to be considered for available openings for which you qualify, upon release from your doctor.

Id. at 240-41.[5]

B.

PROCEDURAL HISTORY

On November 9, 1984, plaintiff filed suit in district court, pursuant to 42 U.S.C. § 1983, claiming that she was

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[5] The district court found that the statements contained in Dr. Postlethwaite's letter did not conform to the record because plaintiff did not advise personnel on September 28 that she was declining the second job offer. Rather, she indicated that she wished to discuss the offer with Dr. Postlethwaite. Although plaintiff did cancel her appointment with Dr. Postlethwaite on October 1, the district court found that plaintiff at no time declined this job. The district court further found that plaintiff was under no obligation at any time prior to October 1 to report to work or to furnish satisfactory documentation justifying her continued absence. She was on worker's compensation leave and had not been released by her doctor. Noting that Carman had stated to plaintiff during the September 28 meeting that he would give her the benefit of the doubt as to whether plaintiff's leave of absence expired on September 30, the district court also found that the letter itself reflected the defendants' knowledge that plaintiff's worker's compensation claim was pending. The district court concluded that the records concerning plaintiff's leave supported plaintiff's position that she was not placed on a limited period of disability. Joint Appendix at 43 (Findings of Fact and Conclusions of Law).

wrongfully and illegally discharged without notice of the charges against her and without opportunity for a pre-termination hearing as required by the due process clause of the fourteenth amendment and by the University's rules and regulations.

A bench trial was held on September 17, 23, 24, October 29 and November 2, 1987. By agreement of the parties, the issue of sovereign immunity under the eleventh amendment was reserved for a separate hearing after trial, dependent upon a finding of liability. On December 14, 1988, the district court entered its Findings of Fact and Conclusions of Law in favor of plaintiff.

On April 6, 1989, the district court entered a consent order dismissing the action against the University and the individual defendants in their official capacities, except to the extent that prospective injunctive relief was awarded. Thus, only defendant Dr. Postlethwaite in his individual capacity remained to satisfy any monetary judgment. The district court entered judgment for plaintiff on June 21, 1989, holding Dr. Postlethwaite liable for lost wages in the amount of $52,183.68 and compensatory damages for emotional distress in the amount of $5,000. Dr. Postlethwaite was also ordered to provide plaintiff with any appropriate raises, establish her annual salary at $17,725 and pay contributions into both her pension fund and her social security fund. The district court ordered plaintiff reinstated to her previous position as senior secretary in CTDD and enjoined defendants from terminating plaintiff without notice and a pre-termination hearing. Plaintiff was also awarded attorney's fees in the amount of $45,240.63 and expenses in the amount of $2,016.20.

The district court denied defendants' motion for a new trial or reconsideration of the judgment on August 4, 1989. Defendants filed a timely notice of appeal with this Court on August 15, 1989.

II.

THE DISTRICT COURT'S LEGAL ANALYSIS

In concluding that defendants violated plaintiff's procedural due process rights under the fourteenth amendment, the district court first determined that plaintiff possessed a constitutionally protected interest in continued employment as defined in *Bishop v. Wood*, 426 U.S. 341 (1976), *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). The district court correctly stated the requisite constitutional inquiry to be whether rules or understandings, stemming from an independent source such as state law, amount to an implied promise of continued employment. *Roth*, 408 U.S. at 577. Specifically, the district court stated:

> The initial question is whether plaintiff had a constitutionally protected interest in continued employment. . . . Such interests do not arise from the Constitution itself, however, but rather "are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law – rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577.

Joint Appendix at 48-49 (Findings of Fact and Conclusions of Law).

The district court correctly cited *Duncan v. City of Oneida*, 735 F.2d 998, 1000 (6th Cir. 1984), for the proposition that this Court has recognized that an implied contract or mutually explicit understanding is sufficient to create a property interest in public employment. *Duncan* involved a 42 U.S.C. § 1983 action brought by a former municipal police officer ("Mr. Duncan") against the City of Oneida and various city officials. Mr. Duncan claimed that the city deprived him of a property interest in his job. in *Duncan*, in affirming the district court's grant of the defendants' motion for a directed verdict, we concluded that the former police officer had failed to set forth any facts to support his claim that he possessed a property interest in continued public employment. Thus, while the outcome in *Duncan* is inapposite to the conclusion reached by the district court, the district court was correct in stating that this Court recognizes that a constitutionally protected property interest may be created by an implied contract or mutually explicit understanding.

The district court also concluded that "[p]laintiff's written and oral communication with Colson, combined with the actions of University officials, letters from Bowen, Harris and Postlethwaite, and the employment status policy, created a mutual understanding, both implicit and explicit, of continued employment of at least six months from September 4, 1984." To support this conclusion, the district court relied on *Soni v. Board of Trustees of Univ. of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). In *Soni*, we upheld the district court's determination that " 'there existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation

of future and continued employment.' " within the meaning of *Roth* and *Perry*. The basis for the determination that a property interest existed was that the University in *Soni* had "objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency" at the University, thereby creating a viable understanding on the professor's part. *Soni*, 513 F.2d App. 350.

The district court found, as a matter of law, that plaintiff possessed a property interest in continued employment. "The words, actions and policies of defendants combined to create an implied promise of continued employment and to give plaintiff a legitimate claim of entitlement to such employment." Joint Appendix at 49 (Findings of Fact and Conclusions of Law). In arriving at the conclusion that an implied promise or mutually explicit understanding had been created pursuant to the words, actions and policies of defendants, the district court found that plaintiff's claim of entitlement to continued employment was based on several items of evidence accruing over three cumulative stages of events.[6]

The first stage of events commenced on June 29, 1984, when Bowen advised plaintiff that she had been reappointed and referred her to the Personnel Policies and

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[6] The district court's findings of facts in this case are not clearly erroneous and are supported by the evidence. Findings of fact by a district judge should not be reversed unless clearly erroneous. Fed. R. Civ. P. 52(a). A finding of fact will only be clearly erroneous when, although there is evidence to support it, "the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

Procedures Manual. The employment status policy contained in that manual stated that regular staff nonexempt employees were employed for a term expected to be six months or more. This same language was contained in the revised policy of July 1, 1984, despite the additional provision that employees in plaintiff's category were at-will employees. The district court determined that while the reappointment letter and the language of the employment status policy did not create a claim of entitlement to continued employment, they did provide a prelude to defendants' other actions with respect to plaintiff's situation at the university.

These other actions occurring at the second stage were as follows: Dr. Postlethwaite's letter of July 1, 1984, terminating plaintiff's employment within CTDD effective July 31, 1984, and the modification of this termination date to extend indefinitely while plaintiff sought other employment within the University, pursuant to the July 23, 1984, meeting among plaintiff, Harris and Carman. Both Harris' July 24, 1984, letter and Dr. Postlethwaite's July 26, 1984, letter to plaintiff confirmed the modification of the termination date. The indefinite extension of the termination date led the district court to conclude that:

> [T]hese assurances, while not amounting to a promise of employment for a particular period of time, reinforced the mutual expectations of the parties about plaintiff's future continued employment with the University. They also negated in large measure the effect of Dr. Postlethwaite's letter terminating plaintiff's employment in the CTDD. After these assurances, plaintiff did not expect to be employed in the

> CTDD indefinitely, but she did have an expectation of indefinite future employment within the University."

Id. at 51.

The third stage of events, upon which the district court based its final conclusion, occurred subsequent to the July meeting and letters. The district court determined that events arising out of Colson's efforts to resolve plaintiff's grievances elevated the parties' expectations of indefinite employment to the level of an implied contract or mutually explicit understanding, thereby creating a property interest in continued employment. Colson was authorized to resolve plaintiff's grievance and to make commitments on behalf of the University administration within the context of grievance resolution. The district court concluded that Colson's September 4, 1984, letter, advising plaintiff that she would be retained as a full time employee within CTDD for up to six months, as well as the subsequent meeting between Colson and plaintiff to discuss Colson's findings, culminated in an implied contract or mutually explicit understanding between the parties that plaintiff would be given a six-month period of employment in rheumatology during which she could seek employment elsewhere in the University. Plaintiff did not appeal this portion of Colson's decision, rather, she accepted the six month extension of her employment. Reasoning that Colson's commitments to plaintiff, following the previous two stages of events, created a mutually explicit understanding upon which the parties acted, the district court

held that plaintiff possessed a property interest in continued employment for at least six months from September 4, 1984. *Id.* at 51.

III.
DISCUSSION AND ANALYSIS
A.

Conclusions of law are subject to de novo review by this Court. *See In re Edward M. Johnson & Assocs., Inc.*, 845 F.2d 1395, 1398 (6th Cir. 1988).

On appeal, defendants argue that the implied promise or mutually explicit understanding found to exist by the district court fails to establish contractual rights under Tennessee law. Defendants maintain that reference to Tennessee law is required in determining whether a property interest in continued employment has been created. The issue before us, therefore, is whether the district court erred in holding that plaintiff possessed a constitutionally protected interest in continued employment with the University. As stated previously, the district court set forth the correct legal analysis to be applied, but the district court applied the law incorrectly. The district court failed to determine if indeed there existed a basis from which a due process property right stemmed in this case. Our inquiry has yielded no independent basis from which plaintiff can claim a protected property interest. Thus, we find that plaintiff is not entitled to relief under 42 U.S.C. § 1983.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the

fourteenth amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Such interests do not arise from the Constitution itself, but rather, "are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. The independent source may be a statute, policy practice, regulation or guideline. *Bishop v. Wood*, 426 U.S. 341, 347 (1976). The rules or understandings need not be a formal tenure system or even an explicit contractual provision, but "agreements implied from 'the [defendants'] words and conduct in the light of the surrounding circumstances' " may be sufficient to constitute a protected property interest. *Perry*, 408 U.S. at 602 (quoting 3A Corbin on Contracts § 562 (1960)); *see Bishop*, 426 U.S. at 344; *Roth*, 408 U.S. at 577. If such interest is recognized by state law, then the employee possesses a property interest of which the state employer cannot deprive him without providing due process. *Bishop*, 426 U.S. at 344.

Thus, while recognizing that a property interest may be created in the absence of an express contractual provision, *Bishop* makes clear that reference must be made to the law of contracts of the state whose law applies:

> A property interest in employment can, of course, be created by ordinance, or by implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

Bishop, 426 U.S. at 344-45 (footnote omitted); *see also Perry*, 408 U.S. at 601-02 ("[A]bsence of such an explicit contractual provision may not always foreclose the possibility that [an employee] has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' ").

In *Bishop*, the Court noted that North Carolina recognized an enforceable expectation of continued public employment only if the employer, by statute or contract, had actually granted some form of guarantee. Whether such a guarantee had been given in that particular case could only be determined by an examination of the particular state statute or ordinance in question. *Bishop*, 426 U.S. at 345.

B.

In the instant case, the district court failed to examine Tennessee contract law. Tennessee law is dispositive of plaintiff's claim of a property interest in continued employment arising out of an implied contract. We are compelled to reverse because Tennessee does not recognize the enforcement of an implied contract against the state and has not done so since 1980.[7]

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[7] We seriously question whether Colson's letter of September 4, 1984, containing his report and recommendation regarding plaintiff's grievance created any kind of contract, implied or otherwise. It merely sets out his recommended resolution of

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Article I, section 17, of the Tennessee Constitution provides in part that "suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." This section has been interpreted as a grant of sovereign immunity to the state. Therefore, no suit against the state may be sustained absent express authorization from the Tennessee Legislature. *Greenhill v. Carpenter*, 718 S.W.2d 268, 270 (Tenn. App. 1986); *see also Brown v. State of Tennessee*, 783 S.W.2d 567, 571 (Tenn. App. 1989) (stating that the state as sovereign is immune from suit except as it consents to be sued); *Stokes v. University of Tennessee*, 737 S.W. 2d 545, 546 (Tenn. App. 1987) ("[a] statute permitting suit against the state must be strictly construed and may not be enlarged upon by implication"), *appeal denied* (1987), *cert. denied*, 485 U.S. 935 (1988).

The constitutional sovereign immunity is clarified by Tennessee Code § 20-13-102(a), which provides:

> No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as

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the grievance. At the most it would be an offer to settle on the terms recommended. Plaintiff attempted to accept the part favorable to her and reject the balance. The recommendation did not suggest that it was severable. The attempt at partial acceptance cannot create a contract of any kind. *See Roy v. Thomas*, 191 Tenn. 195, 202, 232 S.W.2d 32, 35 (1950) (stating that "acceptance of an offer must exactly and precisely accord with the terms of the offer").

> to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

Thus, unless the state has expressly consented to be sued, sovereign immunity bars a court from entertaining any suit against the state.

As stated above, the district court relied on *Soni v. Board of Trustees of Univ. of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), in concluding that the written and oral communications with Colson and the actions of University officials created a mutual understanding arising to the level of a property interest in continued employment. We find this application of *Soni* improper.

In *Soni*, this Court held that the eleventh amendment did not bar a monetary judgment against the University of Tennessee. This conclusion was based on the court's finding that the Tennessee Legislature might have waived sovereign immunity with respect to the University pursuant to a statute allowing the University to sue and be sued. *Id.* at 351-52.

However, following the decision in *Soni*, in 1977, the Tennessee legislature amended the state's sovereign immunity statute to provide: "[n]o statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity." Tenn. Code Ann. § 20-13-102(b). In *University of Tennessee v. United States Fidelity & Guaranty Co.*, 670 F. Supp. 1379, 1380-81 (E.D. Tenn. 1987), the court noted that the effect of *Soni* was abrogated by the Tennessee General Assembly in 1977

when the State's Sovereign Immunity Statute was amended by language in Tenn. Code Ann. § 20-13-102(b).

Further examination of Tennessee law applicable at the time this suit was filed reveals that Tennessee had waived its sovereign immunity only with respect to suits against the state based on an express contract or breach thereof. In 1984, the relevant law was to be found in Tenn. Code Ann. § 29-10-101. Although repealed as of January 1, 1985, Tenn. Code Ann. § 29-10-101 was in full force and effect when plaintiff filed suit on November 9, 1984. Tenn. Code Ann. § 29-10-101 provided:

> The several circuit and chancery courts of Davidson County, Tennessee, shall, subject, to appeal as provided by law, have jurisdiction to enter judgments against the state founded upon any *express* contract or breach thereof with the state and shall determine all questions of fact involved without the intervention of a jury, subject to the limitations of this chapter. (emphasis added).

The recent decision by the Tennessee Court of Appeals in *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 736 (Tenn. App. 1989), provides a concise history of Tennessee's waiver of immunity with respect to contract actions against the state, including the elimination of a waiver of implied contract actions:

> When the General Assembly first waived the State's sovereign immunity in 1977, it permitted actions based on "express or implied contract or breach thereof." *See* Act of May 4, 1977, ch. 281 § 1, 1977 Tenn. Pub. Acts 652, 653, codified at Tenn. Code Ann. §§ 29-10-101 through 29-10-103 (1980). The General Assembly narrowed the scope of the waiver in 1980 by

> eliminating causes of action based on implied contracts. *See* Act of March 27, 1980, ch. 754 § 1, 1980 Tenn. Pub. Acts 796.

Id. at 736.[8]

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[8] *Computer Shoppe* further stated:

> In 1982, the General Assembly created a special committee to study the manner in which the claims against the State and its employees were being processed. *See* Act of April 6, 1982, Senate Joint Resolution 216, 1982 Tenn. Pub. Acts 865. The study committee's report, filed on February 20, 1984, recommended that the State continue to waive its sovereign immunity in contract. *See Report of the Study Committee Created by Joint Senate Resolution 216 of the 92nd General Assembly*, at p. 18 (Feb. 20, 1984). It also recommended legislation to provide for the administrative processing of claims against the State. Section 8(a)(11) of the proposed bill permitted claims against the State for "[a]cts constituting a breach of contract."

The General Assembly enacted the legislation. However, in the process, it replaced the study committee's proposed breach of contract provision with language similar to Tenn. Code Ann. § 29-10-101(a)(1). *See* Act of May 24, 1984, ch. 972 § 8(a)(12), 1984 Tenn. Pub. Acts 1026, 1030, now codified at Tenn. Code Ann. § 9-8-307(a)(1)(L) (Supp. 1988)]. The General Assembly also repealed Tenn. Code Ann. §§ 29-10-101 through 29-10-103. *See Act of May 24, 1984, ch. 972* § 19(b), 1984) Tenn. Pub. Acts 1026, 1035. The Act as codified at Tenn. Code Ann. § 9-8-301 through 9-8-307 (1987 & Supp. 1988), provides the statutory basis for the Tennessee Claims Commission's jurisdiction. Thus, Tenn.Code Ann. § 9-8-307(a)(1)(L) permitted claims against the State arising out of "[a]ctions founded on any express contract or breach thereof." *See Computer Shoppe*, 780 S.W.2d at 736.

"[C]ontracts are express when their terms are stated in words at the time the agreement is made." *Thompson v. Woodruff & Co.*, 47 Tenn. (7 Cold) 401, 409 (1870) (quoted in *Computer Shoppe*, 780 S.W.2d at 735).[9] *See also*

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[9] The Tennessee Court of Appeals in *Computer Shoppe* was called upon to determine whether an express oral contract was within the jurisdiction of the Tennessee Claims Commission, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L) (Supp. 1988), which authorized the Commission to hear claims premised upon any express contract or breach thereof. Relying on *American Lead Pencil Co. v. Nashville, Co. & St. L. Ry.*, 124 Tenn. 57, 64, (1911) and *Johnson v. Central Nat'l Ins. Co.*, 210 Tenn. 24, 34-35 (1962), the court in *Computer Shoppe* stated that the Tennessee Supreme Court has recognized the existence of oral contracts, despite dicta to the contrary in *V.L. Nicholson Co. v. Transcom Inv. & Fin. Ltd.*, 595 S.W.2d 474, 482 (Tenn. 1980).

The district court's finding that a mutual explicit understanding existed between plaintiff and defendants does not establish an oral express contract under Tennessee's above quoted definition of an express contract, oral or written. There is no point in time prior to plaintiff's termination which evidences a clear, definitive statement of the terms of an agreement regarding plaintiff's continued employment at the University. The mutual explicit understanding found to have existed by the district court was based on the words, actions and policies of defendants. Oral express contracts require the parties' express assent concerning their terms. *See Computer Shoppe*, 780 S.W.2d at 735. Implied contracts do not require express assent concerning the terms of an agreement. *Id.* Implied contracts arise by inference from the parties' conduct, in light of surrounding circumstances. *See Perry*, 408 U.S. at 601-02. "The court must look to the conduct of the parties' in light of the circumstances, i.e., the court must look to the atmosphere of the dealings." *Cummins v. Brodie*, 667 S.W.2d 759 (Tenn. App. 1983) (citing *V.L. Nichcolson Co. v. Transcon Investment and Finance, Ltd., Inc.*, 595 S.W.2d 474 (Tenn. App. 1980). The district court made no factual finding

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Constantin v. Univ. Tennessee, No. 86-7-II, slip op., (Tenn. Crim. App. July 9, 1986) (determining that complaint brought by former full professor against University for dismissal without cause did not allege express words or writings which could be considered an express contract, but did allege a de facto tenure contract which arose by implication from the University's conduct, thus the Chancellor properly held he was without jurisdiction to entertain the complaint).

Plaintiff concedes that her claim is "not based on a breach of an express contract." Plaintiff-appellee's brief at 24. Section 29-10-101 grants permission to bring suit only on express contracts. "A determination that plaintiff is not suing on an express contract leaves her with no authority upon which to sue the state." *Greenhill v. Carpenter*, 718 S.W.2d 268, 273 (Tenn. App. 1986).

In *Greenhill*, the Tennessee Court of Appeals held that sovereign immunity barred liability of the Memphis State University ("MSU"), the University president, athletic department and head football coach. The theory of liability was based on an alleged breach of an implied contract to insure the life of a student member of the MSU football team who was killed in an airplane crash while on a recruiting trip with the head coach. *Greenhill* relied on Article I, section 17 of the Tennessee Constitution and Tenn. Code Ann. §§ 20-13-102, 29-10-101(a)(1) in

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that there was mutual assent to the particular terms of an agreement of plaintiff's continued employment with the University.

disposing of the claim brought by the mother of the deceased student, Ms. Greenhill. At the trial court level Ms. Greenhill apparently brought suit alleging breach of an express contract, but did so in Shelby County, not Davidson County, as required by Tenn. Code Ann. § 29-10-101(a)(1). However, on appeal, in an apparent attempt to avoid the terms of the statute. Ms. Greenhill claimed that the contract allegedly breached was an implied contract, rather than an express contract, and therefore was not covered by § 29-1-101(a)(1). Ms. Greenhill further claimed that because her claim was not covered by the statute, the Shelby County trial court erred in ruling that it lacked subject matter jurisdiction over her contract claim on the basis that such a claim could only be brought in Davidson County under the provisions of §29-10-101(a)(1).

The Tennessee Court of Appeals agreed that the contract allegedly breached was an implied contract and thus was not covered by the statute. The court then stated that an implied contract claim left Ms. Greenhill with no authority upon which to sue the state. *Id.* Thus, the court rejected the claim that § 29-10-101(a)(1)'s grant of jurisdiction to Davidson County courts over express contract claims against the state barred implied claims in Davidson County but did not bar such claims absolutely. Specifically, the court stated that "the Tennessee Constitution provides that suits against the state may only be brought 'in such manner and in such courts as the Legislature may by law direct.' " *Id.* at 273 (quoting the Tennessee Constitution, art. I, § 17).

Thus, it is clear that unless the state has expressly waived its sovereign immunity with respect to a theory of

relief against the state, such a suit will not be entertained. *Greenhill* involved a claim which misapprehended the nature and effect of the constitutional and statutory provisions for Tennessee sovereign immunity. Tennessee does not recognize the enforcement of implied contract claims against the state.

The result reached by the Tennessee Court of Appeals in *Stokes v. University of Tennessee at Martin*, 737 S.W.2d 545 (Tenn. App. 1987), similarly compels the result we reach herein. *Stokes* involved a similar attempt by a claimant to avoid the terms of § 29-10-101(a)(1). In addition to finding that the § 29-10-101 cloaks the University with sovereign immunity, the court reiterated that the statute waives sovereign immunity only with respect to express contract and specifically provided for suits on express contracts in the courts of Davidson County. *Id.* at 546. Like the instant case, *Stokes* was an employee discharge case. The former employee alleged that his termination was arbitrary, capricious, without sound basis, and that by virtue of University personnel policies, he had an expectancy of continued employment and could only be discharged for cause. He, therefore, claimed he has been deprived of his property right in continued employment without due process and in violation of 42 U.S.C. § 1983. The discharged employee argued that § 29-10-101(a)(1) was not applicable to him; similar to the plaintiff in *Greenhill*, he further argued that Weakley County, not Davidson County, as dictated by the statute, was the proper venue for his suit because he was suing on an implied contract and not an express contract. *Id.* at 546.

The *Stokes* court stated that even if the suit were based on an express contract, § 29-10-101(a)(1) mandated

dismissal of the suit because the statute related only to express contracts and specifically provided for suits thereon in the courts of Davidson County. Implied contract claims against the state of Tennessee are not recognized and are not enforceable in any court in the state. *See id.*

Because, in 1984, Tennessee did not recognize the enforcement of an implied contract against the state and had not waived its sovereign immunity with respect to other than express contract claims against the state, we find that the district court erred in holding that plaintiff possessed a constitutionally protected property interest in continued employment for a period of six months or more. The district court failed to conduct the requisite analysis of state law in this case. *See Bishop*, 426 U.S. at 344; *Perry*, 408 U.S. at 601-02; *Roth*, 408 U.S. at 577. Had it done so, no property interest would have been found to have stemmed from Tennessee law based on an implied contract. "[T]he sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop*, 426 U.S. at 344. In the instant case, plaintiff's claim of entitlement is clearly insufficient when examined in light of Tennessee law.

This conclusion, that plaintiff does not possess a constitutionally protected property interest in continued employment with the University for the reason that Tennessee has not waived its sovereign immunity with respect to implied contract suits against the state, compels a finding also that the district erred in holding Dr. Postlethwaite liable for damages in his individual capacity because Dr. Postlethwaite did not deprive plaintiff of a recognized property interest under state law.

IV.

CONCLUSION

In sum, because Tennessee does not recognize enforcement of an implied contract against the state, plaintiff's claim necessarily fails. Accordingly, we **REVERSE** the district court's June 21, 1989, judgment and **VACATE** the order granting plaintiff reinstatement, restitution, attorneys' fees and costs.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TELENA D. WOOLSEY, Plaintiff, VS. JAMES C. HUNT, M.D., Chancellor, University of Tennessee Center for Health Sciences; ARNOLD E. POSTLETHWAITE, M.D.; and THE UNIVERSITY OF TENNESSEE, Defendants.	*	NO. 84-2949 G FILED DEC 14 1988

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this case Telena D. Woolsey, a former employee of the University of Tennessee Center for the Health Sciences (UTCHS), seeks damages pursuant to 42 U.S.C. § 1983. She contends that defendants terminated her employment with UTCHS in violation of her due process rights under the Fourteenth Amendment of the United States Constitution. Defendants are James C. Hunt, UTCHS Chancellor; Dr. Arnold E. Postlethwaite, director of the Connective Tissue Diseases Division (CTDD) of the Department of Medicine at UTCHS; and the University of Tennessee. The case was heard by the court without a jury. The court has considered all the evidence in the case and the applicable law and makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Plaintiff Woolsey was first employed at UTCHS on February 9, 1977, as a senior secretary in the Connective Tissue Diseases Division. Prior to her employment, plaintiff had been an executive secretary for a number of years. On September 1, 1981, Woolsey's position was reclassified and upgraded and she was promoted to the position of office supervisor in the division. Among her duties were secretarial duties for the chief of the section, administrative duties and training and supervision of office personnel. Plaintiff was an exemplary employee. Division director Dr. Robert S. Pinals gave her an outstanding evaluation for 1983-84. This was the highest possible evaluation for a UTCHS employee. He characterized Woolsey as "an excellent employee, very efficient, devoted to her job. . . . "

The events leading to this lawsuit began in 1984. In the summer of that year Pinals left UT to accept a position as chairman of the Department of Medicine at Princeton University. Postlethwaite was designated to assume the position of division director previously occupied by Pinals. Postlethwaite quickly decided that he did not want Woolsey working in his department. The record does not reveal the precise reason for this sentiment on Postlethwaite's part,[1] but the evidence plainly supports a

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[1] There is some evidence to suggest that Postlethwaite simply resented Pinals and wanted to get rid of plaintiff because she had been Pinals' trusted assistant. There is also evidence suggesting that Postlethwaite simply felt that the

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finding that Postlethwaite wanted Woolsey removed from the department.

Shortly after Postlethwaite had been named Pinals' successor, on March 28, 1984, Postlethwaite told Pinals that he wanted plaintiff to leave when he took over. Pinals told Postlethwaite that there must be cause for such an action and that no cause existed. Postlethwaite responded that he would document cause. Pinals made a written record of this conversation and signed it on April 2, 1984. Pinals also testified about this conversation in his deposition, which was admitted at trial, and confirmed that it had occurred as recorded. In the conversation with Pinals, Postlethwaite expressed no dissatisfaction with the position of office supervisor, but referred only to Woolsey personally.

After this conversation Postlethwaite consulted with Scott McDaniel, business manager for the department of medicine, about reorganizing the division of connective tissue diseases. McDaniel apparently referred the matter to Paula Harris, then director of personnel services. Harris ultimately approved Postlethwaite's proposed reorganization, which included the elimination of plaintiff's office supervisor position.

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office supervisor's position created confusion and frustration on the part of senior secretaries in the department and that this organizational structure resulted in the secretaries receiving orders from too many people. The court finds that Postlethwaite's actions were motivated more by a desire to get rid of plaintiff than a desire to rid himself of a poor organizational structure. The court makes no finding about why Postlethwaite wanted Woolsey out of his department.

Meanwhile, Pinals informed plaintiff about his conversation with Postlethwaite. Before Postlethwaite assumed his duties, plaintiff also learned about the possibility that Postlethwaite would reorganize. With this information she promptly sought the advice of Roland Woodson, UTCHS director of employee relations. Plaintiff and Woodson had a number of telephone conversations concerning plaintiff's situation. As early as April 2, 1984, Woodson assured plaintiff that Postlethwaite could not "get rid of" her through "reorganization," and that what was being done to her was "immoral" and an "injustice." Plaintiff's testimony about these conversations was confirmed by tape recordings of her conversations with Woodson. Although Woodson's testimony about the conversations was evasive, he could not deny their essential content. Woodson also relayed his feelings about plaintiff's treatment to his superiors Howard Carman, Vice Chancellor for Facilities Management and Human Resources, and Dr. T. Earle Bowen, Vice Chancellor for Administration. Plaintiff also had a conversation with Bowen, in which Bowen stated that Postlethwaite's action was illegal and could not be done.

Despite these assurances to plaintiff from university officials, Postlethwaite notified plaintiff in a memorandum dated July 1, 1984, the day he took over the division, that he was eliminating her position by reorganizing effective July 31 and that she should "apply for employment elsewhere within the university."

UTCHS' reduction in force personnel policy states that its purpose is to provide "a consistent and equitable

method of reducing [staff] through periods when curtailment of operations or funds is necessary." It further provides that when a department "must reduce its number of employees because of curtailment of operation or lack of funds," employees in each job classification will be terminated in reverse seniority order. Clearly, this reduction in force policy contemplates reductions caused by necessary curtailment of operation or funds. Neither circumstance existed in the present case. Thus, Postlethwaite's reorganization was not a reduction in force, but simply a restructuring to suit his own preferences. There is apparently no written university policy dealing with such reorganizations; there was no testimony about any unwritten policy relating to such reorganizations either.

Before receiving the termination memo dated July 1, 1984, plaintiff received a reappointment letter from Bowen. In the letter she was advised that her salary, effective July 1, 1984, would be at a monthly rate of $1,254.00 and an annual rate of $15,048.00. The letter stated that the "terms and conditions of your employment with the University of Tennessee are in accordance with the policies and procedures set forth in the Personnel Policies and Procedures Manual." The employment status policy contained in that manual at the time stated that regular staff non-exempt employees were employed "for a term that is expected to be six months or more." A new employment status policy took effect on July 1, 1984, which stated that all non-faculty employees "are not employed for a specified time, but, instead, serve on an 'at will' basis subject to the policies and procedures set forth in the Personnel Policies and Procedures Manual." The revised policy also contained the language included

in the old policy stating that employees in plaintiff's category were employed for a term that is expected to be six months or more. There is no evidence that any of the parties were aware of the revision at any time pertinent to this lawsuit.

Shortly after receiving notice of the elimination of her position, plaintiff on July 17, 1984, initiated a grievance pursuant to UT's employee grievance policy. Her grievance complained about two distinct matters associated with the elimination of her position. First, she complained that junior secretaries were being retained, while her position was being eliminated. Second, she stated that the elimination of her position was as a result of Postlethwaite's "personal whim" to get rid of her and was "without due cause." Plaintiff requested reversal of the plans to eliminate her position and the cessation of further threats to get rid of her.

Nine days after she filed her grievance, plaintiff's outstanding evaluation was reduced. On July 25, 1984, Scott McDaniel notified plaintiff that her April 25, 1984, evaluation by Pinals had been reduced two levels to satisfactory. McDaniel testified that the downgrading of plaintiff's evaluation was part of a random process to comply with the mandate from the university to limit the number of employee evaluations in each of the four categories. McDaniel further testified that Woolsey's evaluation had been downgraded several weeks earlier, but that he had inadvertently forgotten to notify her until July 25, 1984.

McDaniel's explanation for this change in plaintiff's evaluation is simply not credible. McDaniel admitted that

all other employees whose evaluations had been reduced were notified in May and received a letter at that time. Plaintiff, however, was not notified of any reduction until after her grievance was filed. Further, in a July 26, 1984, memorandum to Woolsey, McDaniel claimed that Pinals had requested this downgrading in the evaluation. Pinals denied that he ever made such a request in his deposition, and, given Pinals' opinions concerning plaintiff's performance, it is inconceivable that he could have done so. Finally, McDaniels said that Pinals had not timely requested approval of plaintiff's outstanding evaluation from the Dean of the College of Medicine. Pinals' timely request for such approval on April 25, 1984, however, was admitted into evidence. Neither Pinals nor plaintiff ever received any notice of a problem with the outstanding evaluation until McDaniels' July memo to plaintiff. The evaluation presented to plaintiff in April, which she signed, rated her outstanding.

After her evaluation was downgraded, plaintiff filed a second grievance concerning her evaluation.

On July 23, 1984, plaintiff met with Harris and Carman. Carman offered plaintiff continued employment of one to two months if she would drop the grievance. Plaintiff refused. Carman and Harris then agreed to extend her employment indefinitely to allow her to seek other employment at UT. Harris confirmed this agreement by letter to plaintiff dated July 24, 1984. The letter stated that the reorganization of the CTDD had affected Woolsey's duties and that her responsibilities would be those defined by appropriate administrators of that division.

On July 26, 1984, Postlethwaite wrote to plaintiff advising that her employment in the division was being extended beyond July 31, 1984, and instructing her to report as a temporary secretary to VA Research Services, a part of the division. He outlined plaintiff's duties in that position. Plaintiff was instructed to vacate her office by Monday, July 30, 1984. Plaintiff contacted Woodson, who advised her that this kind of treatment was "harassment," "intimidation," and "reprisal."

While moving out of her office in compliance with Postlethwaite's order, plaintiff injured her wrists. This injury required medical treatment. Initially plaintiff was put on authorized sick leave. This was subsequently converted to a leave of absence under worker's compensation. Plaintiff was on some type of leave from the time of this injury until after her termination in October 1984. Thus, she never assumed the position in VA Research Services.

Between July 16 and September 28, 1984, plaintiff made repeated efforts to have her grievances processed to the hearing stage by UT officials. Under UT's grievance procedure, the employee must file within five days of the director's adverse action. The departmental chairman then has five days in which to reply to the employee. If the chairman fails to respond, then the employee can present the grievance to the dean. If the employee is not satisfied with the dean's action, then the employee can request a hearing before the employee relations committee.

After plaintiff filed her first grievance, department chairman Dr. Andrew Kang did not respond timely.

Plaintiff attempted to take the grievance to Dean Robert Summitt who refused to hear it until Kang first considered the matter. On August 16, 1984, plaintiff wrote Kang about the matter since he had still failed to address the grievance. Finally, on August 17, 1984, Kang upheld the actions of Postlethwaite in removing plaintiff and the actions of McDaniel in downgrading her evaluation. Plaintiff promptly appealed to Dean Summitt. Dean Summitt delegated the decision about the grievance to Raymond H. Colson, Associate Dean for Administration of the College of Medicine.

On September 4, 1984, Colson issued his decision on plaintiff's first grievance. In this decision Colson supported the decision to eliminate plaintiff's position and recommended that she "be retained as a regular full time employee with the rheumatology division for up to six months at her current rate of pay while she looks for a suitable transfer." Colson also refused to intercede in plaintiff's appeal of her evaluation downgrade. Colson's written memorandum decision concluded with the following:

> The above constitute my findings and recommendations. Should they not satisfy the employee, Mrs. Woolsey is requested to contact the Personnel Office in order to process her grievance to the next level.

At trial defendants took the position that Colson's decision was merely a recommendation to university officials and not binding on them. Colson, however, admitted that the recommendation made was to Woolsey, not a higher UT official. This view is clearly supported by the language of the decision. Colson acknowledged in his

testimony that if Woolsey had not appealed his decision, it would have been considered final. Woolsey did not in fact appeal this portion of Colson's decision; thus it in effect did become final and binding on the parties.

Colson met with Woolsey to present the recommendation to her. Plaintiff told him that she was satisfied with the six-month extension of employment, but was not satisfied with the failure to address the fact that Postlethwaite had tried to get rid of her without cause. She also disagreed with the resolution of the evaluation grievance. Woolsey believed that, as a result of the meeting and the decision, her employment had been extended for another six months by Colson.

On September 7 and 11, 1984, plaintiff wrote memoranda to Woodson informing him of her desire to appeal Colson's decision and proceed to a hearing before the grievance committee on both her grievances. Plaintiff requested a hearing on the job elimination grievance because of the failure of UT officials to address Postlethwaite's desire to remove her without cause. She also appealed the evaluation grievance, which had been resolved adversely to her in its entirety. On September 14, 1984, Woodson wrote plaintiff granting her a hearing on the grievances.

Plaintiff went on several unsuccessful interviews for another position on the UT campus. These interviews were arranged through the personnel office. Plaintiff was told not to discuss her salary on these interviews and that, since Colson's recommendation was that her current pay level would be guaranteed, the personnel department would inform the interviewers that her salary would be

supplemented. The positions for which plaintiff interviewed required extensive typing. The interviews were held during the period when plaintiff was on medical leave, and she had to attend the interviews wearing wrist splints. Not too surprisingly, plaintiff failed to locate another position.

On September 19, 1984, Postlethwaite made a written offer to plaintiff of a senior secretary position in the CTDD. The duties of the position were ninety-five percent typing. Woolsey declined the offer in writing due to her current disability. She expressed interest, however, in another senior secretary position in the division that would allow her to do less typing and "gradually build back up and strengthen my typing skills." Plaintiff indicated her hope that Postlethwaite would consider her for that particular senior secretary position, with which plaintiff indicated she was familiar.

On September 25, 1984, Postlethwaite wrote to plaintiff offering a second senior secretary position. This position was the same position about which plaintiff had expressed interest in her reply to Postlethwaite's first offer. Postlethwaite, however, described the job as consisting of sixty percent typing, more typing than plaintiff believed this position had required in the past. The letter further stated

> . . . since your current approved sick leave extends thru (sic) September 30, 1984 I will need to know your written response (accept or reject) to this job offer and to the VA senior secretary offer of September 19, 1984 on or before 8:00 A.M. October 1, 1984. Send your notification to UTCHS Personnel.

> If you accept either position you should report to my office at 8 AM (sic) October 1, 1984 for orientation as to the specifics of the job.

Postlethwaite testified that Harris assisted him in drafting this letter.

Also on September 25, 1984, prior to plaintiff's receipt of Postlethwaite's second offer, Harris contacted plaintiff twice by telephone to arrange a meeting for Friday, September 28. In the first call Harris advised plaintiff that Postlethwaite could not be available for a grievance hearing during the week of October 1 as plaintiff had requested. Harris then arranged a meeting for September 28 in Carman's office to discuss Woolsey's situation.

The September 28 meeting was a key event in the saga leading to the termination of plaintiff's employment. Plaintiff, Carman, Harris and Woodson attended the meeting. Although the recollections of those in attendance differed sharply as to what occurred, plaintiff taped the meeting. A transcript of the entire conversation at the meeting was admitted into evidence by stipulation of the parties and provides an accurate account of what occurred. Harris, Woodson and Carman all testified at trial that the purpose of this meeting was to resolve Woolsey's grievances. Harris and Carman further testified that they felt the meeting had come to an end with a clear understanding that Woolsey had to report for work on Monday, October 1, or else provide medical documentation to extend her leave status beyond September 30, 1984. The transcript indicates that this testimony by defendants' witnesses is plainly inaccurate.

The transcript and plaintiff's testimony established that the following occurred during the meeting. Carman confirmed with plaintiff that Postlethwaite had offered her two different jobs. Plaintiff reiterated to those in attendance that she could not do the ninety-five percent typing job and that she questioned whether she could do the sixty percent typing job at that time. She noted that in her estimation the job in which she had expressed interest had in the past required only thirty percent typing. Plaintiff indicated that she wanted to discuss the sixty percent typing job with Postlethwaite before she made a decision as to whether to accept it. She presented a letter dated September 28 stating her reservations about the sixty percent job and her desire to discuss it. Contrary to defendant's assertions, plaintiff did not decline the second job offer. In response to this discussion it was agreed that plaintiff, Harris, Woodson and Postlethwaite would meet on Monday, October 1, to discuss this second job offer.

Plaintiff's medical disability was also discussed at the meeting. Harris several times mentioned her belief that plaintiff's leave of absence expired September 30, 1984. Plaintiff repeatedly informed Harris that this was not correct, and that she had been advised shortly before the meeting by payroll assistant Eva Gray that she could not return to work until she was released by her doctor. Plaintiff had not been released and indicated that she was still being treated for both stress and her wrist injury. In view of this disagreement between plaintiff and Harris about the expiration date of plaintiff's leave of absence, Carman, who was Harris's superior, several times told plaintiff that he would give her "the benefit of the

doubt," thus indicating that plaintiff's leave of absence would not expire on September 30, 1984. Plaintiff was not told that she was required to report to work on Monday or justify her absence by medical documentation. Any obligation to report on Monday was mentioned solely in the context of an assumption that plaintiff's leave expired on Monday – an assumption which was in fact erroneous, which plaintiff told Harris, Carman and Woodson was erroneous and about which Carman told plaintiff he would give her the "benefit of the doubt."

Neither of plaintiff's pending grievances was resolved at this September 28 meeting. There was no discussion of her evaluation grievance at all. There was some discussion of her grievance concerning Postlethwaite's desire to get rid of her, and Woodson indicated that the grievance hearing would be held in the future.

On the morning of October 1, 1984, plaintiff called Harris and cancelled her appointment to discuss the second job offer with Postlethwaite. She advised Harris that she was physically unable to keep the appointment and stated "I think you can count me out on future appointments until the grievance hearing is over. I can't take any more of the stress. I've had it." A tape was also made of this conversation and, contrary to Harris' assertion at trial, Harris did not tell plaintiff that she "needed to come in" that morning. Plaintiff also left word at Postlethwaite's office on the morning of October 1 that she was physically unable to keep the appointment for that day.

Plaintiff had no further contact with UT officials between October 1 and the date on which she received two letters dated October 8, 1984. The first letter, signed

by Woodson, advised plaintiff that her grievances had been resolved and that he was concluding his responsibility in the matter. The letter indicated that the September 28 meeting was for the purpose of addressing the grievance. Woodson indicated that the university's response to the grievance had been to offer two positions at plaintiff's current salary. These positions, Woodson noted, were the original jobs plaintiff requested. For this reason Woodson indicated "there is no need to proceed with the grievance process."

Woodson indicated that, with respect to her evaluation grievance, her evaluation was being changed to excellent. Excellent is the evaluation grade above satisfactory and below outstanding. Woodson's action in resolving the grievances by letter was inconsistent with the discussion at the September 28 meeting which contemplated that a hearing in the future would resolve the grievances. In addition, as previously noted, the transcript of the September 28 meeting cannot reasonably be construed to support a finding that the purpose of that meeting was to resolve Woolsey's grievances. Woodson's letter therefore incorrectly states the purpose of the September 28 meeting.

The second letter dated October 8 was signed by Postlethwaite. It was, however, written on personnel department letterhead, and the proof at trial demonstrated that Harris dictated it. This letter stated in part:

> On September 28, 1984, you advised Personnel that you did not wish to accept this second job offer.
>
> In sum, we have offered you all available clerical positions within the Division. You have

> declined my offers of continued employment in these positions and have failed to furnish me with satisfactory documentation justifying your continued absence from your job.
>
> Therefore, in accordance with my letter of September 28, I consider your nonacceptance of my offers of continued employment and your unexcused failure to report to work as a voluntary resignation under UT Personnel Policy, 505, Pol. Your University termination will not interrupt any salary replacement awarded by the State Board of Claims as a result of your Worker's Compensation claim if approved. Your final pay will include all accumulated annual leave.
>
> Should you be interested in other employment within the University, you may contact Human Resources to be considered for available openings for which you qualify, upon release from your doctor.

The October 8 letter from Dr. Postlethwaite contains a number of statements that are simply not supported by the record in this case. First, plaintiff did not advise personnel on September 28 that she was declining the second job offer. Instead, she indicated that she wanted to discuss the offer with Postlethwaite. Although plaintiff did cancel her appointment with Postlethwaite on October 1, she at no time declined this job.

Second, plaintiff was under no obligation at any time prior to October 1 to report to work or to furnish satisfactory documentation justifying her continued absence. She was on workers' compensation leave of absence and had not been released by her doctor. The letter itself reflects the knowledge of university officials that plaintiff's workers' compensation claim was pending. Although

Harris had stated her impression that the leave of absence expired September 30 in the September 28 meeting, plaintiff had expressed her disagreement with this date. Carman had indicated to plaintiff that he was giving her "the benefit of the doubt."

The records concerning plaintiff's leave support plaintiff's position rather than that of Harris. The records indicate that plaintiff was not placed on a limited period of disability. To support Harris' position, defendants rely on a PAF form that indicates an expected return date of October 1. The undisputed testimony was that the purpose of a PAF form is to make a payroll change; the form is not used to grant or deny a leave of absence. The PAF in question was not used to grant plaintiff's leave of absence. Additionally, the PAF form itself is puzzling. The October 1 date is handwritten, while the remainder of the form is typed. No defense witness could identify the author of the form or the reason for the October 1, 1984, return date. The October 1 date is unrelated to any evidence furnished to defendants about plaintiff's medical condition.[2] The only notice to plaintiff was that she

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[2] UTCHS was advised by plaintiff's doctor, J. Charles Taylor, that plaintiff was being evaluated for possible return to work on September 4, 1984. On September 12, 1984, Dr. Taylor wrote Eva Gray in the UT insurance department indicating that plaintiff still had discomfort and felt she could not perform her duties at UT, but that Dr. Taylor felt he could no longer be of benefit to plaintiff. He indicated that he would probably be referring plaintiff to another doctor. On September 13, 1984, Dr. Taylor sent his report to UT, which included a reference to the September 4 visit and stated that Taylor thought plaintiff could return to work at that time. On October 9, 1984, Dr.

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was placed on leave of absence until she was released to return to work.

Defendants contend that plaintiff abandoned her job and voluntarily resigned. Thus, defendants take the position that plaintiff is not entitled to a hearing under the UT disciplinary rules and policy. The university also mandates that each campus maintain a list of work rules prohibiting certain actions which "may be cause for disciplinary actions including termination." Among these work rules is the action for which defendants claim plaintiff was terminated. Item 2 of the university work rules provides:

> Absence of three consecutive days without notification to the supervisor without satisfactory reason will be considered a voluntary resignation.

A separate attendance policy also reiterates this work rule.

Employee disciplinary proceedings are defined as contested cases under the rules promulgated by UT for conducting contested case hearings under the Uniform

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Harry Blumenfeld, to whom plaintiff had been referred by Taylor, wrote a letter furnished to UT indicating that plaintiff was under his care. He stated that he advised plaintiff on September 24, 1984, not to return to work yet and that he would reassess her work status on October 22, 1984. Although these various communications might support a contention that defendants were confused in mid-September about whether plaintiff could have returned to work after September 4, none of them supports a contention that plaintiff's leave expired September 30.

Administrative Procedures Act. Under these rules a contested case is a "proceeding in which the legal rights, duties or privileges of a . . . employee or other individual are required by any statute or constitutional provision to be determined by the university only after that individual has been provided an opportunity for a hearing." The rules set forth detailed procedures for such hearings.

UT also has a written personnel policy 525 titled *Disciplinary Actions*. This policy sets forth a multi-step disciplinary procedure for improper job behavior, which includes documented warnings prior to any disciplinary actions. Improper job behavior refers "generally" to "failure or refusal to carry out job responsibilities or failure to abide by University work rules." The policy provides for direct appeal to the Chancellor of any disciplinary action for improper job behavior. The policy then states that the multi-step procedure does not apply in cases of gross misconduct. Such cases are to be handled under the contested case procedures of the Uniform Administrative Procedures Act or under a less formal internal hearing procedure, if the employee waives his right to the UAPA procedure. Gross misconduct is defined to include a long list of behavior not involved in this case and "other similar acts involving intolerable behavior by the employee." The *Disciplinary Action* policy thus does not mention specifically voluntary resignation.

Plaintiff was not afforded any sort of hearing in connection with her termination. Nor was she afforded a multi-step disciplinary procedure.

On October 22, 1984, plaintiff was released by her doctor to return to work.

Subsequent to her termination by UTCHS, plaintiff searched unsuccessfully for comparable jobs in the secretarial field. She was successful only in finding sporadic employment. She testified that this experience with UTCHS had devastated her whole life and, she felt, destroyed her credibility. She indicated that she was embarrassed by the incident and felt that she had lost friends. She said that the defendants' action had ravaged her health and had caused her to lose twenty-five pounds.

Plaintiff's proof as to relief, which was essentially uncontested, established that her earnings at UT from the date of termination to the date of trial would have been $70,901.27. This figure includes regular earnings, overtime pay and longevity pay. Plaintiff also seeks compensation for personal holiday and annual leave in the amount of $3,610.20. She seeks to have sick leave restored in the amount of 1,131.2 hours. She also seeks compensation for health insurance premiums paid in the amount of $281.16. Plaintiff's interim earnings total $22,608.95.

II. CONCLUSIONS OF LAW AND ANALYSIS OF THE EVIDENCE

This action is brought pursuant to 42 U.S.C. §1983. The court has jurisdiction over the case pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(3) and (4).

Plaintiff claims that defendants violated her rights to procedural due process under the Fourteenth Amendment to the United States Constitution. The initial question is whether plaintiff had a constitutionally protected interest in continued employment. "The requirements of

procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty or property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Such interests do not arise from the Constitution itself, however, but rather "are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. The "independent source" may be a statute, policy, practice, regulation or guideline. *Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Roth, supra*. In an employment context, if these rules or understandings amount to an "implied promise of continued employment," *Roth*, 408 U.S. at 577, then the employee possesses a property interest of which the state employer cannot deprive him without providing due process. The "rules or understandings" need not be a formal tenure system or even an explicit contractual provision, but "agreements implied from the [defendants] 'words and conduct in light of the surrounding circumstances' " may be sufficient to constitute a protected property interest. *Perry*, 408 U.S. at 601-02, (quoting 3 Corbin on Contracts §562 (1960)); *see Roth*, 408 U.S. at 577; *Bishop*, 426 U.S. at 344. The Sixth Circuit Court of Appeals has also recognized that an "implied" contract or "mutually explicit understanding" is sufficient to create a property interest in public employment. *Duncan v. City of Oneida, Tennessee*, 735 F.2d 998, 1000 (6th Cir. 1984).

Under the circumstances of this case plaintiff Woolsey did have a property interest in continued employment. The words, actions and policies of defendants

combined to create an implied promise of continued employment and to give Woolsey a legitimate claim of entitlement to such employment.

Woolsey's claim of entitlement to continued employment is based on several items of evidence. On June 29, 1984, Vice-Chancellor Bowen advised plaintiff that she had been reappointed. His letter stated that the "terms and conditions of your employment with the University of Tennessee are in accordance with the policies and procedures set forth in the Personnel Policies and Procedures Manual." The employment status policy contained in that manual at the time stated that regular staff non-exempt employees were employed "for a term that is expected to be six months or more." Even the revised policy of July 1, of which the parties were apparently unaware at the time of plaintiff's termination, contained this same language, although it also contained a provision indicating that employees in plaintiff's category were at-will employees.

The reappointment letter and the language of the employment status policy, taken alone, do not create a claim of entitlement to continued employment.[3] Although the reference to a term of employment that is expected to be six months or more certainly creates mutual expectations about continued employment, the indefinite nature of the period of employment prevents this language, taken alone, from constituting the "implied promise of

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[3] Because these two items alone do not create a property interest in continued employment, the court rejects plaintiff's argument that she was entitled to a pre-termination hearing in connection with the reorganization.

continued employment" necessary for a property interest. Although the participants in this controversy were apparently unaware of the July 1 revision to include the "at will" language, that change clarified that the employment status policy does not create a promise of continued employment for a period of time. Although they do not create a property interest in continued employment, the reappointment letter and employment status policy provide a prelude to defendants' other actions with respect to plaintiff's situation at the university.

After plaintiff received her reappointment letter, she received the letter from Postlethwaite terminating her employment July 31, 1984. This termination date was later modified. In plaintiff's July 23, 1984, meeting with Harris and Carman, these two UT officials agreed to extend plaintiff's employment indefinitely while she sought other work at UT. This agreement was confirmed by Harris' July 24 letter to plaintiff and Postlethwaite's July 26 letter in which he advised plaintiff of the extension of her employment and told her to report to the VA secretary position. These assurances, while not amounting to a *promise* of employment for a particular period of time, reinforced the mutual expectations of the parties about plaintiff's future continued employment by the university. They also negated in large measure the effect of Postlethwaite's letter terminating plaintiff's employment in the CTDD; after these assurances plaintiff did not expect to be employed in the CTDD indefinitely, but she did have an expectation of indefinite future employment within the university.

Subsequent to the July meeting with Harris and Carman and the July letters from Harris and Postlethwaite,

the events occurred that elevated the parties' rather indefinite expectations to the level of an "implied" contract or "mutually explicit understanding" that creates a property interest in continued employment. These significant events arose out of Colson's efforts to resolve plaintiff's grievance. On September 4, 1984, Colson advised plaintiff by memo that she would "be retained as a regular full time employee within the rheumatology division for up to six months. . . . " Colson met with Woolsey to present his recommendation to plaintiff, and plaintiff advised him that she accepted the six-month extension of her employment. She did not appeal this portion of Colson's decision. The parties thus mutually agreed – implicitly and explicitly – that plaintiff would be given a six-month period of employment in rheumatoloty during which she could look for other work in the university. The "up to six months" phrasing connoted that parties' understanding that plaintiff might well find other work before the six months elapsed.

Defendants make two arguments concerning Colson's letter and his meeting with plaintiff. First, they say that the letter does not mean what it says and that Colson was simply making a recommendation to higher university officials about continued employment – not a decision on plaintiff's grievance at his level. This argument overlooks the fact that Dean Summit delegated the grievance decision to Colson and that Colson issued his decision in a memo to plaintiff, not to any UT officials. The use of the word "recommend" in the memo can only be read as a recommendation to plaintiff, not to Colson's superiors. Defendants' argument also is inconsistent with their actions. After the letter was written, they conducted

themselves in such a way as to indicate that they shared plaintiff's understanding of the September 4 memo. The personnel office attempted to assist plaintiff in locating other employment in the university. Plaintiff was told that the personnel department would notify other departments that her salary would be supplemented – this action was in accord with Colson's decision that plaintiff's current pay level should be guaranteed.

Defendants' second argument is that the actions of Colson cannot create a property interest in continued employment because Colson is not authorized under state law to contract on behalf of the university. Thus, they say, his decision cannot bind the university. This argument misapprehends the nature of the commitments and understandings on the part of an employer that can create a property interest. Colson undoubtedly does not have authority to enter into legally binding contracts on behalf of the university in other contexts. He did, however, have authority to resolve plaintiff's grievance and to make commitments on behalf of the university administration in that context. The university administration placed him in that role and plaintiff correctly perceived him as the appropriate person for her to deal with at that stage of the grievance proceedings. Colson's commitments to plaintiff created a mutually explicit understanding upon which the parties acted.

Plaintiff's written and oral communication with Colson, combined with the actions of university officials, letters from Bowen, Harris and Postlethwaite, and the employment status policy, created a mutual understanding, both implicit and explicit, of continued employment of at least six months from September 4, 1984. *See Soni v.*

Board of Trustees of the University of Tennessee, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). *Cf. Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435, 1440 (7th Cir. 1983); *Zimmerer v. Spencer*, 485 F.2d 176, 178 (5th Cir. 1973); *Stapp v. Avoyelles Parish School Board*, 545 F.2d 527, 532 (5th Cir. 1977).

Plaintiff, relying on *Mayes v. Trammell*, 751 F.2d 175 (6th Cir. 1984), suggests that the university's own contested case and disciplinary rules, regulations and policies, which require a hearing in employee disciplinary actions, created a legitimate expectation that plaintiff would not be discharged without cause and without a pretermination hearing. This expectation, plaintiff argues, amounts to a property interest protected by the due process clause. The court rejects the argument that the contested case and disciplinary rules and policies create a claim of entitlement to continued employment. While certainly these rules and policies might lead an employee to believe that the university, following its own rules, would accord him a hearing, such a unilateral belief does not create a property interest. Courts have generally held that hearing procedures that do not impose a significant substantive restriction on the employer's decision making, *e.g.*, by specifying grounds on which termination must be based, do not in themselves create a property interest in employment. *See Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir. 1986); *Hogue v. Clinton*, 791 F.2d 1318, 1324 (8th Cir. 1986); *Goodisman v. Lytle*, 724 F.2d 818, 120 (9th Cir. 1984); *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). The UT contested case rules and disciplinary action policy do not impose a sufficiently substantive restriction on employer decision making to

create a property right. The contested case rules impose no such restriction at all. The disciplinary action rules clearly contemplate disciplinary action when poor performance or more serious misconduct requires it, and they are substantive to the extent that they define employee misconduct and specify appropriate discipline for misconduct of various types. They do not go so far, however, as to state that an employee can be terminated only for cause or only for the itemized types of misconduct. Thus, while the disciplinary rules do present a colorable argument for creation of a property interest, the court resolves this issue in defendants' favor.

Since the court has concluded that plaintiff had a constitutionally protected property interest in continued employment, the next inquiry is the nature of the protection to which she was entitled or "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). A pre-deprivation hearing is required. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Roth*, 408 U.S. at 569-70 n.7; *Myers v. City of Alcoa*, 752 F.2d 196, 198-99 (6th Cir. 1985); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1067-68 (6th Cir. 1984).[4] The

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[4] The Supreme Court occasionally has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss, and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional *advance* procedural safeguards. *See Dixon v. Love*, 431 U.S. 105, 113 (1977); *Ingraham v. Wright*, 430 U.S. 651, 680 (1977); *Matthews v. Eldridge*, 424 U.S. 319, 339-349 (1976). Here, the loss is serious and the procedures in place are not peculiarly trustworthy. Thus, this is not one of

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requisite pretermination hearing must be "granted at a meaningful time and in a meaningful manner . . . " *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 437 (1982) (quoting *Armstrong v. Manyo*, 380 U.S. 545, 552 (1965) and *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). It is undisputed that plaintiff did not receive a hearing either prior to or subsequent to her termination.

Defendants argue that plaintiff waived any due process rights by voluntarily abandoning her job in failing to report to work on October 1, 2 and 3, 1984. The court rejects this contention on both a factual and legal basis.

The evidence simply does not support a finding that Woolsey abandoned or voluntarily resigned her employment. Woolsey did not even have an actual job position to abandon on October 1, 1984. Plaintiff was on a leave of absence without pay under workers' compensation at that time. Contrary to defendants' assertion, plaintiff was not told to report to work on October 1 or any day thereafter. In addition, plaintiff was advised by the university's insurance department that she was not to return to work until she was released by her doctor, an event that did not occur until October 22, 1984. All that plaintiff did on October 1, 1984, was cancel an appointment with Postlethwaite to discuss whether she could perform the duties of one of the jobs she had been offered. Given the fact that she had not been released by her doctor, there

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those "extraordinary situations" where the deprivation may precede process. *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972). *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

was no particular reason for this discussion to occur on October 1 rather than some other date, other than pressure from defendants.

Defendants' waiver and abandonment of job argument also fails as a matter of law. In making this argument, defendants suggest that plaintiff's "voluntary termination" vitiates any property right in employment beyond the fourth day of unexcused absence. This amounts to the "bitter with the sweet" approach explicitly and emphatically rejected in *Cleveland Board of Education v. Loudermill,* 470 U.S. at 541. Once an employer creates a legitimate expectation of continued employment, it cannot circumvent the dictates of due process by terminating such employment pursuant to a procedure permitting a unilateral determination without a hearing that an employee has voluntarily resigned. Even if defendants are correct in their contention that university policy does not require a hearing in such a situation,[5] university policies and procedures cannot authorize due process deprivations. *See Vitek v. Jones,* 445 U.S. 480, 491 (1980); *Logan,* 455 U.S. at 432.

At trial defendants contended that all necessary due process was provided to plaintiff. Defendants abandoned this argument in their proposed findings of fact and conclusions of law. Plainly under *Loudermill* a pre-termination hearing is required and plainly plaintiff received no such hearing. Defendants' earlier assertion that the

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[5] In fact, the court believes that the more reasonable interpretation of university rules and regulations is that they did require a hearing in this situation.

September 28 meeting constituted an adequate hearing is without merit.

Defendants claim that they are entitled to qualified immunity that bars plaintiff's claims for monetary damages against them in their individual capacity. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Manin v. Michigan Board of Medicine*, 765 F.2d 590, 598 (6th Cir. 1985). Applying this standard, defendants cannot rely on the doctrine of qualified immunity. At the time of plaintiff's termination in 1984, a reasonable person would have known that an employee could not be deprived of a property interest in continued employment without a pre-termination hearing. In addition, under the circumstances of this particular case, a reasonable person would have known that plaintiff possessed a property interest in continued employment subsequent to plaintiff's conference with Colson. Finally, a reasonable person in 1984 would have known that a protected property right is not defined by, or conditioned on, the state's choice of procedures for its deprivation. *Loudermill*, 470 U.S. at 541. Thus, a reasonable person would have known that defendants' waiver argument was legally unsound. The law on each aspect of this case was clearly established in 1984. Accordingly, the qualified immunity defense does not bar plaintiff's recovery of monetary damages.

Neither party has raised the issue of whether a money judgment can be entered against defendant Hunt in this case. Hunt had no personal involvement in plaintiff's termination or in any of the events leading up to it. Liability against him cannot be based on *respondeat superior. Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978). Presumably, if the actions of university officials were consistent with university policy, Hunt might be liable on that basis. The court finds nothing in the university policy, however, that supports denial of a hearing to plaintiff. In fact, both the disciplinary action policy and the contested case procedures support an argument that university policy required that plaintiff receive a hearing prior to her termination. Therefore, the court's conclusion is that plaintiff is not entitled to recovery of monetary damages against Hunt. Hunt is, however, a proper defendant with respect to injunctive relief since his presence in the case is necessary to afford complete relief of this type. Since the parties have not briefed the issue of Hunt's liability, the court will give them an opportunity to do so within ten (10) days of this opinion. If no briefs are submitted, the court's conclusions with respect to defendant Hunt will remain in effect.

One other issue remains in the case with respect to liability – the University of Tennessee's defense of sovereign immunity. Because of a discovery problem relating to that issue, the court determined that this issue would be resolved after hearing at a time subsequent to trial, if plaintiff was successful on her claims otherwise. The court agrees with plaintiff's position that plaintiff should have an opportunity to develop a factual record so that

the court can appropriately apply the nine-factor test set forth in *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985). Therefore, the parties are directed to prepare for a hearing on the sovereign immunity issue to be scheduled in about sixty days.

Plaintiff is entitled to recovery against defendant Postlethwaite. A plaintiff in a procedural due process case is entitled to compensatory damages when there is proof of actual injury. *Carey v. Piphus*, 435 U.S. 247 (1978). Actual injury can include economic injury such as loss of wages, *Kendall v. Board of Education of Memphis City Schools*, 627 F.2d 1 (6th Cir. 1980), and mental and emotional distress caused by the deprivation. *Carey*, 435 U.S. at 264. Plaintiff in this case suffered economic injury, and her calculations as to back wages were essentially undisputed. Accordingly, plaintiff is entitled to lost wages in the amount of $52,183.68. Plaintiff also testified credibly about the emotional distress and physical injury she sustained as a result of Postlethwaite's actions. The court cannot, however, attribute all of plaintiff's misfortunes to the deprivation of a pre-termination hearing. Some of the emotional distress arose prior to her termination and originated with Postlethwaite's proposed reorganization, the grievance proceedings and her own physical injury. Much of plaintiff's embarrassment, however, did stem from the loss of her job. The court believes that a fair amount to adequately compensate plaintiff for her emotional distress sustained as a result of Postlethwaite's deprivation of her due process rights is $5,000.00.

Plaintiff also seeks punitive damages against Postlethwaite. Under the circumstances of this case no punitive damages are warranted. While the actions of Postlethwaite and those who acted under his direction were deliberate and calculated to deprive plaintiff of her job, their conduct does not rise to the level of malice or ill will necessary for an award of punitive damages.

Plaintiff also seeks reinstatement to her position as senior secretary in the Division of Connective Tissue Diseases. As a part of this relief plaintiff seeks an order enjoining defendants from terminating plaintiff until she has been given notice of the charges against her and provided a pre-termination hearing in accord with the procedures set forth in *Loudermill*. This request is problematical, given the nature of plaintiff's property interest in her employment. At best plaintiff had an expectation of continued employment for six months after September 4, 1984. After that point her employment in all likelihood could have been terminated without a hearing without any deprivation of plaintiff's constitutional rights. Obviously, the date on which plaintiff could arguably have been terminated without a hearing has long since passed. Yet if the court denies reinstatement, plaintiff will not have been adequately compensated for the deprivation of her constitutional rights. Accordingly, the court will grant the request for reinstatement. Defendants are ordered to reinstate plaintiff to her previous position as senior secretary in the Division of Connective Tissue Disease. Defendants are enjoined from terminating plaintiff until she is given notice of the charges against her and provided a pre-termination hearing in accord with the procedures set

forth in *Cleveland Board of Education v. Loudermill*. Defendants are also ordered to provide plaintiff with appropriate raises and to establish her salary at $17,725.00 per year. This figure is based on the amounts of expected raises reflected in plaintiff's damages chart. Defendants are further ordered to pay contributions into the pension fund and social security fund for plaintiff to make her whole.

Although the court has ordered plaintiff reinstated, the court questions seriously whether plaintiff and defendants can ever work together amicably in the Connective Tissue Disease Division. Accordingly, the court believes that the preferable resolution of this controversy would be reinstatement to another senior secretary position at UTCHS. The parties are requested to discuss this possible alternative and attempt to reach an agreement about it.

Since plaintiff is the prevailing party, she is entitled to reasonable costs and attorney's fees as provided by 42 U.S.C. §1988. Counsel for plaintiff is directed to submit an application for fees with supporting affidavits to the court within thirty (30) days of entry of this order.

Entry of judgment will await resolution of the sovereign immunity issue and an award of attorney's fees.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES
DISTRICT JUDGE

December 14, 1988
DATE